



CITY OF EDMONDS

121 5TH AVENUE NORTH • Edmonds, WA 98020 • (425) 771-0220 • FAX (425) 771-0221

HEARING EXAMINER

GARY HAAKENSON
MAYOR

In the Matter of the Application of)	NO. CU-2010-28
)	
)	
FIVE Restaurant/Bistro)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For a Conditional Use Permit)	
_____)	

SUMMARY OF DECISION

The request for a conditional use permit (CUP) to allow outdoor seating and extended Friday and Saturday hours of operation at FIVE Restaurant/Bistro at 650 Edmonds Way, in Edmonds, Washington is **GRANTED**, subject to conditions.

SUMMARY OF RECORD

Request:

Ted Clark and Brad Marshall, operators of FIVE Restaurant/Bistro (Applicants), requested a CUP to allow up to 40 outdoor seats and extended Friday and Saturday hours, open till 2:00 am, at FIVE Restaurant/Bistro at 650 Edmonds Way, in Edmonds.

Hearing Date:

The City's Hearing Examiner conducted an open record hearing on the request on June 3, 2010.

Testimony:

At the open record hearing, the following individuals presented testimony under oath:

1. Mike Clugston, Planner, City of Edmonds
2. Brad Marshall, Applicant
3. Ted Clark, Applicant
4. Alvin Rutledge
5. Ron Cantrell

Exhibits:

At the open record hearing the following exhibits were admitted into the record:

Exhibit 1 City of Edmonds Planning Division Staff Report, dated May 25, 2010, with the following attachments:

1. Land Use Application
2. Applicant's Criteria Statement

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3. Site Plan
4. Floor Plan
5. Technical Comments
6. Public Notice and Affidavits
7. Keith and Marleen Bennett letter, dated May 26, 2010

Upon consideration of the testimony and exhibits submitted at the open record hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. The Applicants requested a CUP to allow outdoor seating and extended Friday and Saturday hours, open until 2:00 am, for FIVE Restaurant/Bistro at 650 Edmonds Way, in Edmonds.¹ The proposal would *Exhibit 1, Attachment 1; Marshall Testimony*.
2. FIVE Restaurant/ Bistro opened in 2009, via a change in use permit which allowed operation of a restaurant in a space previously used for retail sales. The existing use has indoor seating for 98 persons. A fenced 975 square foot outdoor seating area was approved in the spring of 2010 with seating for 10 customers, consistent with Edmonds Community Development Code (ECDC) 17.75.010. Customers access the bistro from Edmonds Way. The subject property has frontage along 226th Street SW and there is a small parking area behind the bistro with employee and disabled parking. Customer access to the outdoor seating area is through the restaurant. Currently the bistro is open until 11:00 pm on Fridays and Saturdays. *Exhibit 1, pages 1-2, 4; Marshall Testimony*.
3. The subject property is relatively flat with mature vegetation and trees in the central and western portions of the site. A critical areas checklist was submitted for a previous project on-site in 2001 and a critical areas waiver was then issued. The site is also developed with a single-family residence to the south of the bistro; the residence is not involved in the instant application for conditional use permission. *Exhibit 1, pages 1-2; Site view*.
4. The subject property is one part of a commercial development fronting Edmonds Way. A gas station and convenience store are located to the east at 686 and 660 Edmonds Way at the intersection with 226th Street SW. The parcel to the west at 630 Edmonds Way is developed with a Romio's Pizza and Pasta restaurant and an auto parts store, as well as the parking area that serves 630 and 650 Edmonds Way. The parking lot has 39 to 41 spaces, two of which are occupied by dumpsters from the Romio's and Edmonds Auto Parts. There is additional commercial development across Edmonds Way. Parcels to the south and west are zoned and developed with single-family residential uses. *Exhibit 1, page 3; Exhibit 1, Attachment 7*.

¹ The subject property is known as Tax Parcel Number 27032500309400. *Exhibit 1, page 1*.

5. The Applicants have proposed to expand the outdoor seating to allow for up to 40 people. The request would also extend indoor hours of operation (not outdoor) on Fridays and Saturdays until 2:00 am. Both elements of the proposal require conditional use permits. *Exhibit 1, page 2; Exhibit 1, Attachment 1.*
6. The subject property is zoned Neighborhood Business (BN). *Exhibit 1, page 2.* In the BN district, a conditional use permit is required for a business to be open to the public between the hours of 11:00 pm and 6:00 am. *ECDC 16.45.010.C.3.* Also in the BN zone, outdoor dining that exceeds 10% of indoor seating or eight seats, whichever is greater, is considered a primary use that requires approval of a conditional use permit. *ECDC 17.75.020.*
7. Extended weekend hours are not uncommon for restaurants in Edmonds. The Romio's Pizza and Pasta at 630 Edmonds Way is open until midnight on Fridays and Saturdays. However, the bistro abuts residential zoning, which could mean that residential uses would be impacted by the sounds and/or parking of late night restaurant patrons. In order to limit the potential for impacts, Planning Staff recommended a condition of approval restricting customer parking to the parking lot off of Edmonds Way. *Exhibit 1, page 4; Clugston Testimony.*
8. The Applicants indicated that the proposed outdoor seating would be used seasonally, weather permitting, and is not intended to add 40 patrons to the maximum indoor capacity of 98. According to Applicant testimony, the kitchen could not handle that many guests at once. The Applicants believe that if the outdoor seating is approved, it would result in little increase in customer numbers; rather, the same guest numbers would visit the bistro and more of them could be seated outside. As proposed, outdoor seating for 40 would be provided completely outside of the any public right-of-way in the same area as the existing seating. *Exhibit 1, pages 4-5; Marshall Testimony; Clugston Testimony.*
9. The BN zone requires a 15-foot buffer adjoining any residentially zoned parcels, expressly calling for the following:

The required setback from R zoned property shall be permanently landscaped with trees and ground cover and permanently maintained by the owner of the BN lot. A six-foot minimum height fence, wall, or solid hedge shall be provided at some point in the setback.

ECDC 16.45.020.C.
10. The outdoor seating area is enclosed by wood and chain link fencing with privacy slats. There is a 30-foot-wide landscaped area immediately to the west and a 20-foot-wide landscaped area along the western site boundary, screening the subject property from the adjacent single-family development. Although the existing fencing and landscaping does not exactly match the landscaped buffer with fence described in the code, Planning Staff submitted that it serves the same purpose as and meets the intent of the code's buffer for

general screening of business activity from residentially zoned properties. Staff recommended that additional landscaping be required around the fence enclosing the outdoor seating area, for the purpose of providing additional buffering of outdoor activities. *Exhibit 1, pages 4-5; Clugston Testimony.*

11. In order to further mitigate potential impacts to adjacent residential uses, Planning Staff recommended that the site's southern parking lot be altered by reconfiguring the trash enclosure, restricting parking to employees and disabled patrons, and providing additional landscaping. *Exhibit 1, page 6; Clugston Testimony.*
12. The Applicants indicated that the clientele targeted by the bistro consists of "mature adults" and that their business is conducted in an orderly fashion. By way of example, they stated they do not offer live music and do not attract "the bachelor party crowd". Both operators testified that they live in the neighborhood, that they have young children attending the nearby schools, and that they strive to bring jobs and dining to the neighborhood without adding disturbance or nuisance. *Marshall Testimony; Clark Testimony; Exhibit 1, Attachment 2.*
13. The Applicants requested that the conditional use permit run with the land and be available to future operators in the space. *Marshall Testimony; Clark Testimony; Exhibit 1, Attachment 2.*
14. The Comprehensive Plan designation for the site is "Planned Business/Neighborhood Business" and it is located within the Westgate Corridor. The proposed uses must be found to be consistent with the applicable goals and policies of the Comprehensive Plan, below:

E. Goals for the Westgate Corridor. The Westgate Corridor is generally located between the 100th Avenue W (9th Avenue S)/Edmonds Way intersection and where Edmonds Way turns north to enter the downtown area. By virtue of this location, this corridor serves as both a key transportation corridor and as an entry into the downtown. Long-established neighborhoods lie near both sides of the corridor. The plan for this corridor is to recognize its multiple functions by providing opportunities for small-scale businesses while promoting compatible development that will not intrude into established neighborhoods.

- E.2. Permit uses in planned business areas that are primarily intended to serve the local neighborhood while not contributing significantly to traffic congestion.
- E.5. Use design review to ensure that development provides a transition to adjacent residential neighborhoods. For uses in transitional areas adjacent to single family neighborhoods, use design techniques such as the modulation of facades, pitched roofs, stepped-down building heights, multiple buildings, and landscaping to provide designs compatible with single family development.

The following Comprehensive Plan policies and goals for residential development also apply:

B5 Protect residential areas from incompatible land uses through the careful control of other types of development and expansion based upon the following:

- B.5.a Residential privacy is a fundamental protection to be upheld by local government.
- B.5.b Traffic not directly accessing residences in a neighborhood must be discouraged.
- B.5.c Stable property values must not be threatened by view, traffic or land use encroachments.
- B.5.d Private property must be protected from adverse environmental impacts of development including noise, drainage, traffic, slides, etc.

City of Edmonds Comprehensive Plan, pages 69, 74-75.

15. The proposal was considered by the City's Building and Engineering Divisions, Public Works and Parks Departments, and the Fire District. The Building Division submitted comments indicating that a permit would be required to increase the occupancy load of the outdoor seating area. The Engineering Division and Fire District would also review subsequent permit applications for the improvements. None of the review agencies presented concerns or opposed approval of the requests. *Exhibit 1, page 2; Exhibit 1, Attachment 5.*
16. Notice of application and public hearing was posted, mailed to neighboring property owners within 300 feet, and published in The Herald on May 20, 2010, consistent with the notice provisions of ECDC 20.91. *Exhibit 1, page 2; Exhibit 1, Attachment 6.*
17. The owners of the building addressed as 630 Edmonds Way, with which building the Applicants share parking, submitted written comments opposing the requested CUP. According to calculations based on commercial square footage, the comment letter asserted that the three uses served by the parking lot require 35 parking spaces pursuant to Edmonds off-street parking regulations. The lot contains approximately 39 to 41 (depending on vehicle size), less two occupied by dumpsters. The writer stated that the recent addition of the bistro as a tenant has already resulted in "difficulty with respect to the sharing of parking space." Further, the letter expressed concerns that the additional outdoor seating and extended hours could lead to intoxicated customers causing accidents as they exit the property. The letter requested that outdoor seating be limited to 10 persons and that the request for extended hours of operation be denied. *Exhibit 1, Attachment 7.*
18. A neighborhood resident expressed concerns relating to the following: employee parking on the street in the neighborhood; the potential for disturbing noise; cleanliness around

the bistro's dumpster; and the lack of public comment opportunity regarding future tenants' use of the site if the CUP were to run with the land. *Cantrell Testimony*.

19. At hearing, public comment was offered supporting the request for extended Friday and Saturday hours, citing the possibility of retaining trade in Edmonds at that time of night, rather than losing late night dining business to nearby establishments in adjacent cities. *Rutledge Testimony*.
20. Citing ECDC 17.75.020, Planning Staff pointed out that the Community Development Code specifically establishes that no additional parking is required of outdoor seating approved as a primary use through the CUP process. Staff stated that the existing lot contains adequate parking spaces for the uses served, but that a joint use parking agreement may be required as a separate matter. *Clugston Testimony: Exhibit 1, page 5*.
21. The Applicants reaffirmed that the outdoor seating is neither intended nor likely to add to the total volume of customers, but will only affect where guests sit. They also requested that the CUP be approved to run with the land, so future purchasers of the business, if any, would not have to incur the expense of reapplying for the outdoor seating approval and extended hours. *Marshall Testimony*.

CONCLUSIONS

Jurisdiction:

The Hearing Examiner has jurisdiction to hear and decide CUP requests pursuant to ECDC 20.100.010.A.3 and 20.05.010.

Criteria for Review:

Pursuant to ECDC 20.05.010, the Hearing Examiner may not approve a CUP unless the following findings can be made:

- A. That the proposed use is consistent with the comprehensive plan;
- B. Zoning Ordinance. That the proposed use, and its location, is consistent with the purposes of the zoning ordinance and the purposes of the zoning district in which the use is to be located, and that the proposed use will meet all applicable requirements of the zoning ordinance;
- C. Not Detrimental. That the use, as approved or conditionally approved, will not be significantly detrimental to the public health, safety and welfare, and to nearby private property or improvements unless the use is a public necessity; and
- D. Transferability. The hearing examiner shall determine whether the conditional use permit shall run with the land or shall be personal.

Conclusions Based on Findings:

1. With conditions, the proposed use would be consistent with applicable City of Edmonds Comprehensive Plan goals and policies for the “Planned Business/Neighborhood Business” land use designation and the Westgate Corridor. Conditions of approval would also mitigate potential impacts to adjacent residential uses, consistent with residential goals and policies. *Findings 2, 5, 7, 8, 11, and 14.*
2. Pursuant to ECDC 16.45.000, the purpose of the BN zone is to reserve areas for those retail stores, offices, retail service establishments which offer goods and services needed on an everyday basis by residents of a neighborhood area, and to ensure compact, convenient development patterns by allowing uses that are operated chiefly within buildings. Extended business hours (beyond the standard 6:00 am to 11:00pm) and outdoor seating are allowed in the BN zone with conditional use approval. The existing site vegetation satisfies the intent of the buffer/screening requirement of ECDC 16.45.020; however, a condition of approval would require additional landscaping to surround the outdoor seating area, further buffering the adjacent residential uses from the bistro's activities. Compliance with bulk/dimensional requirements and building and fire codes would be assured through building permit review. *Findings 2, 5, 6, 7, 8, 9, 10, 11, 15, and 20.*
3. With conditions, the proposal would not be detrimental to the public health, safety, or welfare, and would not have adverse impacts on surrounding uses. As proposed, the increased outdoor seating would function as a replacement for indoor seating. Its use would be seasonal and weather-dependent. The business targets a mature adult crowd and does not allow live music on-site. Conditions of approval would limit patron access to the outdoor eating area to an end time of 10:00 pm and outdoor clean up (no patrons) to 11:00 pm. A condition would require additional landscaping to buffer the outdoor dining area from the residential uses to the south and east. Subsequent building permit review would ensure all improvements are installed to code requirements. With regard to parking, the record demonstrates that minimum required off-street parking requirements are met. The Code prohibits additional parking from being required of outdoor seating approved pursuant to the CUP process in the instant case. *Findings 5, 7, 8, 9, 10, 11, 12, 15, 17, 18, 19, 20, and 20.*
4. The CUP should be personal and not transferable to future operators of the business. The Applicants have assured that they intend to run their business as conscientious members of the neighborhood where they, too, live. However, the Applicants can only control their own business activities, not those of future tenants in the property. The site is adjacent to residential zoning, and the requested conditional uses have the potential to result in noise and parking impacts. Restricting conditional use approval to the instant operators ensures future public review processes, consistent with Comprehensive Plan residential policies that require protection of residential areas from incompatible land uses through the careful control of other types of development and expansion. Future public processes would allow the parking question to be revisited. *Findings 12, 15, 17, and 18.*

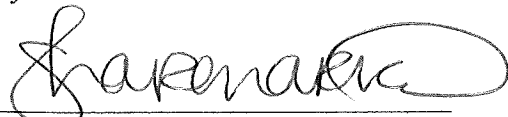
DECISION

Based on the preceding findings and conclusions, the request for CUP to allow outdoor seating and extended Friday and Saturday hours at FIVE Restaurant/Bistro at 650 Edmonds Way, in Edmonds is **GRANTED**, subject to the following conditions:

1. The use may be open for business on Friday and Saturday from 6:00 am through 2:00 am. The hours of operation for Sunday through Thursday shall comply with the BN zone requirements (6:00 am through 11:00 pm).
2. Up to 40 seats may be provided in the outdoor seating area behind the existing restaurant. Management shall allow outdoor seating such that customer occupancy of the outdoor dining area shall end at 10:00 pm and outdoor clean up shall be completed 11:00 pm, which is the latest that any activity in the outdoor dining area may occur.
3. The Applicants must obtain building permit approval to increase the occupant load of the outdoor dining area. At the time of building permit review, the Applicants shall present plans for improving the arrangement of the southern site access from 226th Street SW including, but not limited to, providing additional landscaping, reconfiguring the trash enclosure, and restricting parking in that area to employees and disabled patrons.
4. This permit is subject to applicable requirements contained in the Edmonds Community Development Code and it is the responsibility of the Applicants to ensure compliance with the various provisions contained in these ordinances.

DECIDED this 17th day of June 2010.

Toweill Rice Taylor LLC
City of Edmonds Hearing Examiners
By:



Sharon A. Rice



CITY OF EDMONDS

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HEARING EXAMINER

GARY HAAKENSON
MAYOR

RECONSIDERATION AND APPEAL

The following is a summary of the deadlines and procedures for filing requests for reconsideration and appeals. Any person wishing to file or respond to a request for reconsideration or an appeal should consult the relevant ordinances and/or contact the Planning Division of the Development Services Department for further procedural information.

REQUEST FOR RECONSIDERATION

ECDC 20.06.010 contains the procedures for requesting reconsideration of a Hearing Examiner decision. Requests for reconsideration must be filed with the City Planning Director within 10 calendar days of the Hearing Examiner's decision no later than 4:30 p.m. on the last business day of the reconsideration period. Only parties of record (i.e., the applicant, any person who testified at the open record hearing on the application, any person who individually submitted written comments on the application, or the City of Edmonds) may file a request for reconsideration. The grounds for reconsideration are limited to errors of procedure, errors of law or fact, errors of judgment, or the discovery of new evidence that was not known and could not in the exercise of reasonable diligence have been discovered. Reconsideration requests must contain the information specified in ECDC 20.06.010(D) and be accompanied by the required filing fee.

APPEALS

Pursuant to ECDC 17.50.090(A)(3) and ECDC 20.19.050, appeals may be taken from the hearing examiner's decision to the city council under the provisions of Chapter 20.07 ECDC. An appeal must be filed within 14 days after the issuance of the hearing body's written decision. The city council's decision on appeal shall be final. A request for reconsideration is not a condition precedent to an appeal. Judicial appeals must be filed within 21 days from the date of the city's final decision in a given matter pursuant to the procedures established in the Land Use Petition Act.

EFFECT OF REQUEST FOR RECONSIDERATION ON APPEAL DEADLINE

The timely filing of a request for reconsideration stays the Hearing Examiner's decision until such time that the Hearing Examiner issues a decision on reconsideration, and the appeal period commences on the date of issuance of the decision on reconsideration.

LAPSE OF APPROVAL

ECDC 20.05.020(C) states: "Time Limit. Unless the owner obtains a building permit, or if no building permit is required, substantially commences the use allowed within one year from the date of approval, the conditional use permit shall expire and be null and void, unless the owner files an application for an extension of the time before the expiration date."

NOTICE TO COUNTY ASSESSOR

The property owner may, as a result of the decision rendered by the Hearing Examiner, request a change in the valuation of the property by the Snohomish County Assessor's Office.

